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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-932

STEVE LEKOMETROS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-1125

CHARLES BERNSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-6227

NICK JOHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 508 F.2d 1134.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1975. Petitioner Lekometros filed a timely petition for certiorari on January 28, 1975. Bernstein's petition (No. 74-1125) was not filed until March 7, 1975, and consequently is out of time under Rule 22(2) of the Rules of this Court.[1] John filed a timely petition for rehearing in the court of appeals. Rehearing was denied on February 20, 1975, and John's petition for certiorari was timely filed on March 20, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence that does not show personal knowledge of the interstate element of the crime is sufficient to support the conviction of petitioner John for conspiring to violate the Travel Act.

2. Whether the government used proper procedures to obtain, execute and report on wire interception orders:

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[1] The stay of mandate obtained by petitioner Bernstein (Bernstein Pet. App. A-22) does not extend the time within which to petition for certiorari. *Boylan* v. *United States*, 257 U.S. 614. A stay of mandate suspends the effectiveness, not the finality, of a judgment.

a. Whether an affidavit by the Attorney General adequately establishes his role in the request for authorization.
b. Whether overhearing agents should have fully recorded each conversation.
c. Whether the agents adequately "minimized" the extent of the overhearings.
d. Whether agents timely provided petitioner John with an inventory of the overhearings.

3. Whether the court of appeals properly applied the harmless error doctrine with regard to evidence that showed that a newspaper article was read by petitioner Lekometros to a co-conspirator.

4. Whether the Jencks Act requires the government to record the proceedings of the grand jury.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioners were convicted of conspiracy to violate 18 U.S.C. 1952 (the Travel Act) by using interstate telephone facilities to carry on a gambling business violative of state law, in violation of 18 U.S.C. 371. In addition, petitioner Bernstein was convicted on five substantive Travel Act counts. All petitioners were sentenced to terms of three years' imprisonment and $2,000 fines; the sentences of petitioner Bernstein are to run concurrently. The court of appeals affirmed (Pet. App. A; 508 F.2d 1134).[2]

[2] "Pet. App. A" refers to the appendix in No. 74-932.

1. Beginning in December 1970, agents of the Federal Bureau of Investigation conducted an investigation of the gambling activities of petitioners and others in St. Louis and Clayton, Missouri, and Las Vegas, Nevada.[3] The evidence at trial disclosed an extensive enterprise in which petitioners Lekometros and John, and others, received gaming odds from confederates (including petitioner Bernstein) in Las Vegas. After receipt of these odds (sometimes by telephone, and sometimes after personal visit), petitioners would alter the odds and accept bets on sporting events. Petitioners Lekometros and Bernstein do not challenge the sufficiency of this evidence. Petitioner John contends that the evidence shows at most that he was involved in a gambling enterprise, but that it does not show his knowledge of its interstate character (John Pet. 10). We therefore summarize the evidence only as it pertains to petitioner John.

On the morning of December 20, 1970, John, Lekometros and co-defendants Eugene Hanon and Victor Padratzik met at a restaurant in Clayton. Hanon disclosed that he had just returned from Las Vegas, where he had won more than $3,000 (Tr. 794). Lekometros complained that he had "a problem with my book" (Tr. 795). Hanon stated that he would

[3] Several co-defendants were named in the indictment with petitioners. Mark Hanon, Eugene Hanon and Aaron Singer pleaded guilty prior to trial. Charges against David Goldberg were dismissed. Co-defendant Victor Padratzik, tried and convicted with petitioners, died shortly after the opinion of the court of appeals was filed.

alleviate Lekometros's problem by booking "what you can't handle" (Tr. 795). Lekometros stated that the previous day was a good one; that he estimated that he had "beat them for about 250 per game"; and that the "price of money" was bound to fall if those results continued (Tr. 795). Hanon told Lekometros that he erred by being influenced by local action and by unknowledgeable people, causing him to "shave the line" (Tr. 795). In further conversation Padratzik, Hanon, and Lekometros discussed the odds on professional football games, with Hanon informing that "the bottom three teams on your board's wrong. You'll lose money on that" (Tr. 796). Hanon also complained that he had been meeting with the others for thirteen weeks and still had not straightened out all of the matters (Tr. 796-797). Lekometros suggested that they consider hockey, noting that although the low scoring in that sport made it difficult to "get set up," they should be able to arrive at some sort of arrangement (Tr. 797).

Beginning in January 1971, federal agents conducted court-approved electronic surveillances of certain telephone lines frequently used by petitioners and their co-defendants. On January 25, 1971, John told his employer, Padratzik, that he had received a fifty dollar wager from a bettor who had the code number 21; that he had passed on half the bet (evidently by layoff) to Eugene Hanon; and that he had received two other wagers (Govt. Exh. 21; Tr. 208, 1098-1099).

In March 1971, federal agents observing and monitoring the telephone calls of Bernstein in Las Vegas and Padratzik in St. Louis were able to detect a pattern. According to the agents' testimony at trial, Padratzik would telephone Bernstein at previously set times, would receive the latest information regarding odds on forthcoming sports events, and would be told which of several telephone numbers to call the following day (Tr. 48, 132, 488-492, 541-543, 918-919, 1101-1102; Govt. Exhs. 22, 25, 26). Then Padratzik would relay the odds information to John and discuss the wagers accepted by John (Tr. 132, 306, 1102-1106; Govt. Exhs. 28, 30, 33, 34, 36).

On the morning of March 20, Lekometros, Padratzik, John, and Eugene Hanon were observed seated at a table at the Clayton Inn discussing upcoming hockey and basketball games. Terms such as "line," "favorite" and "points" were used often during the conversatioin (Tr. 1020-1022).

On the afternoon of April 5, 1971, Padratzik, John, Singer, Eugene Hanon and Lekometros were observed together at a restaurant in St. Louis. Both Hanon and Padratzik commented that the "heat was on." Several minutes later Hanon stood up and said that if Padratzik were afraid to make the call to Las Vegas, he would do it (Tr. 679-683).

2. On June 19, 1971, agents in Las Vegas and St. Louis arrested petitioners and certain of their co-defendants. Padratzik and John were arrested as they sat by a card table in the bedroom of a motel suite in St. Louis. Upon being told that they were

under arrest, Padratzik tore a pack of paper into pieces and placed it upon the bed beside him. A box of pens and pencils and several packets of quick burning flash paper were on the card table. Several sheets, including the ones torn by Padratzik, contained written notations of wagers, results of wagers, amounts owed or due to bettors, and wagering information for forthcoming baseball games (Tr. 1119-1127, 1211-1217).

In the course of the search, the agents answered several telephone calls. One, from a person who identified himself as "25," requested information about a starting pitcher. A second, calling himself "number 9," made a $200 wager on a baseball game (Tr. 1138-1139). Another caller, "55," asked "Is this Vic?" and then quickly hung up (Tr. 1301). Then "44" called, asking if Duke were there. An unidentified caller also asked for Duke. Then "55" called back, asking for Duke or Nick, and whether "it" was in. Finally, "45" called and asked what was the matter. An agent said that nothing was the matter. The caller asked "Who is this?" and abruptly hung up (Tr. 1301-1303).

ARGUMENT

1. Petitioner John alleges that the evidence is insufficient to convict him because it does not establish that he knew interstate facilities had been used to transmit the information necessary for the gambling business. However, the evidence shows that John worked directly with Padratzik in a bookmaking op-

eration, that he attended several meetings of the conspirators when gambling was openly discussed and interstate telephone calls were attempted, that he was a participant in the discussions regarding wagers, and that he ordinarily received the "line" information from Padratzik immediately after the latter had received it from Las Vegas. The jury could properly infer from this pattern of conduct, as well as from John's presence at critical meetings involving telephone calls, that John was well aware of the out-of-state source of the information.[4] See *United States* v. *Sanchez*, 508 F.2d 388, 393 (C.A. 5); *United States* v. *Hester*, 465 F.2d 1125 (C.A. 8); *United States* v. *Aron*, 463 F.2d 779 (C.A. 9).[5]

Petitioner John apparently contends as well (John Pet. 11) that interstate transmission of gambling odds does not violate the Travel Act. *Rewis* v. *United States*, 401 U.S. 808, held that a wholly intrastate gambling business does not violate 18 U.S.C. 1952 simply because some customers may come from out

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[4] It therefore is unnecessary to consider whether every conspirator's personal knowledge of the interstate character of the transaction is an element of the offense. Cf. *United States* v. *Feola*, No. 73-1123, decided March 19, 1975.

[5] *United States* v. *Barnes*, 383 F.2d 287 (C.A. 6), is not to the contrary. The only interstate elements in *Barnes* were the purchase of dice and chips manufactured out-of-state and the occasional cashing of checks drawn on out-of-state banks. The court concluded that the government had not shown knowledge of these elements. The interstate element in the instant case is far more important to the enterprise, and we have demonstrated that the evidence supports an inference that John knew of that element.

of state. But here, unlike *Rewis*, the government showed that the interstate telephone calls were integral parts of the successful operation of the bookmaking business of which John was a part, and that the calls were made by the conspirators themselves. The conspiracy in this case was within the reach of the Travel Act.

2. Petitioners contend that defective procedures were used by the government to obtain, carry out and report on four court orders permitting interceptions of wire communications.

The procedure used in this case to obtain the court orders was identical to that held not to warrant suppression in *United States* v. *Chavez*, 416 U.S. 562. A memorandum personally initialed by then Attorney General John Mitchell directed the Assistant Attorney General for the Criminal Division to make application for an order to permit interception of oral communications. An application was filed in the district court, accompanied by a letter from the Deputy Assistant Attorney General stating that authorization to seek the wiretap order had been delegated to the latter by Mr. Mitchell. When petitioners later challenged this application, the government furnished the district court with a sworn affidavit of Mr. Mitchell stating that he personally had initialed memoranda authorizing the four applications for interception orders (see Pet. App. A-4).

a. Petitioners were not entitled to a remand for a "hearing to probe the true role of Attorney General Mitchell in the authorization procedures" (Lekome-

tros Pet. 8). As in *Chavez*, the Attorney General submitted an affidavit that he personally approved the application. Petitioners have asserted no basis for questioning the accuracy of this affidavit. As stated in *United States* v. *Doolittle*, 507 F.2d 1368, 1371 (C.A. 5):

> The procedure of filing the affidavit of the Attorney General and his subordinates, as a method of proving the administrative history of the specific authorization in this case, is identical to that used in *Chavez*. There is no constitutional infirmity in the district court's refusal to require more of the Attorney General on this narrow issue of fact.

See also *United States* v. *Bohn*, 508 F.2d 1145 (C.A. 8), petition for a writ of certiorari pending, No. 74-951.

Petitioners' situation is unlike that in *United States* v. *Robinson*, 472 F.2d 973 (C.A. 5) (*en banc*), a pre-*Chavez* decision, which remanded to allow the government to supplement the record regarding the authorization procedure. In *Robinson* the district court had not developed any record on the authorization procedures, and the remand would have produced additional evidence that the court of appeals believed necessary to determine the legality of the government's procedures. But *Chavez* now is conclusive on that legal question, and petitioners have not demonstrated that the record on the factual issue in this case is inadequate to support the inquiry required by *Chavez*.

b. In the court of appeals, petitioners contended that the government did not "minimize" the extent of overhearings. Petitioners also contend, somewhat inconsistently, that the agents should have more fully recorded their conversations. The agents had not recorded portions of conversations they had concluded were of a private nature. Petitioners repeat both arguments here.

The court of appeals properly declined to address these arguments, because petitioners had not raised them in the district court in a motion to suppress, as required by 18 U.S.C. 2518(10)(a) (Pet. App. A-8 to A-10). Section 2518(10)(a) unequivocally states that suppression motions "shall be made before the trial * * *." Petitioners did not raise these claims at any time in the district court, and they cannot raise them here. See *United States* v. *Sisca*, 503 F.2d 1337, 1346-1349 (C.A. 9), certiorari denied, November 11, 1974, No. 73-1855.

Petitioners suggest, however, that their neglect is excusable because they did not understand before trial the meaning of the term "private conversation," which the government placed in the transcripts to indicate non-recorded portions, and because they filed pretrial motions urging that "the procedure for interception was invalid and unconstitutional" (Lekometros Pet. 6-7). However, petitioners could have inquired about the meaning of "private conversation," although we think that the term, in context, is clear. Nor did the blunderbuss contention of invalidity satisfy Section 2518(10)(a); the purpose of that sec-

tion is to allow all suppression issues to be litigated prior to trial (see *Sisca*, *supra*, 503 F. 2d at 1348). This objective cannot be achieved unless the grounds of illegality are urged with some particularity, so that the government can respond and the district court can pass upon them. Section 2518(10)(a) requires pretrial decision of the suppression claims and is not a device through which unlitigated claims of error can be stored up for presentation to the court of appeals.

In any event, the conduct of the agents in shutting off the recording mechanism after determining that they were overhearing conversations unrelated to gambling was a reasonable attempt to comply with 18 U.S.C. 2518(5), which provides that interceptions "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter." *United States* v. *Scott*, 504 F.2d 194 (C.A.D.C.); *United States* v. *Manfredi*, 488 F.2d 588, 600 (C.A. 2), certiorari denied, 417 U.S. 936; *United States* v. *Tortorello*, 480 F.2d 764, 784 (C.A. 2), certiorari denied, 414 U.S. 866; *United States* v. *Cox*, 462 F.2d 1293, 1300-1301 (C.A. 8); certiorari denied, 417 U.S. 918.[6]

c. Petitioner John's argument (Pet. 14-16) that the district court should not have allowed the government to postpone (until the last interception had ended) service of the inventory of conversations in-

[6] Only petitioner John (John Pet. 17) raises the alternative claim that the agents failed to minimize their overhearings. He advances no arguments in support of this assertion, and we know of none.

tercepted pursuant to the first of four authorizations[7] was properly rejected by the Eighth Circuit (Pet. App. A-6 to A-8). That court found that postponements were proper because they were necessary to preserve the effectiveness of the continuing investigation. The government's requests conformed to the standards set forth in the statutory scheme, see 18 U.S.C. 2518(8)(d), and did not contravene the obligation of the government to provide notice within a reasonable time.

3. At the outset of the investigation, agents observed and heard Lekometros read to confederates a newspaper article concerning a gambling raid. The article reported that federal agents had conducted a gambling raid simultaneously in 26 cities and had made 27 arrests, including the arrest of two executives of Caesar's Palace in Las Vegas, Nevada, and that the executives had been charged with using telephones in aid of racketeering (Tr. 264-265). Lekometros then commented, "Well, that just goes to show you you should stay off the telephones in your business" (Tr. 269). He also described the correct way to use operators in long distance calls for his "business" (Tr. 269-270).

At trial, an agent was permitted to read the article to the jury (Tr. 264-265). The court instructed the jury that the article was not evidence of the truth of any matter contained therein (Tr. 268).

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[7] Postponements were not required as to the three later court-authorized interceptions, since the investigation terminated within ninty days of the orders approving the interceptions.

In the court of appeals, the government contended that this incident was not erroneous, because the reading established the state of mind of those at the meeting. However, the court concluded that, in light of references in the article to "the financial apparatus which bankrolls organized crime" (Tr. 265, 266) the article should not have been read because its prejudicial effect outweighed its probative value. But, the court held, the error was harmless in light of the overwhelming evidence of petitioners' guilt (Pet. App. A-14).

Petitioners apparently contend that a prejudicial error cannot also be harmless (Lekometros Pet. 10-11). This is inaccurate. The discussion of the article was an "isolated intrusion of prejudicial evidence" (Pet. App. A-15) that "did not influence the jury, or had but very slight effect ***." *Kotteakos* v. *United States*, 328 U.S. 750, 764. The court was entitled to conclude that the prejudice was harmless beyond a reasonable doubt. See Comment, *Principles for Application of the Harmless Error Standard*, 41 U. Chi. L. Rev. 616 (1974). Moreover, the issue involves a particularized judgment based on the court of appeals' review of the record in this case and presents no question of general importance meriting review by this Court.

4. Petitioner John claims that the government "deliberately" failed to record the grand jury testimony of some of its main witnesses, thereby depriving him of materials that would have been subject to production under the Jencks Act, 18 U.S.C. 3500

(John Pet. 12-13). However, nothing in the record supports the argument that the government intentionally deprived the defendants of Jencks Act materials. In any event, recordation is not mandatory (Pet. App. A-13 to A-14). See Fed. R. Crim. P. 6. The 1970 amendment to the Jencks Act, codified as 18 U.S.C. 3500(e)(3), provides for the production of grand jury testimony for purposes of impeachment. But the amendment does not require the government to record all grand jury testimony in order to develop potential Jencks Act statements. See *United States* v. *Cruz*, 478 F.2d 408 (C.A. 5), certiorari denied *sub nom. Fuentes* v. *United States*, 414 U.S. 910. Recordation is governed by Rule 6; Section 3500(e)(3) applies only after the testimony has been recorded.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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